92-1010

FILED
DEC 14 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

No._____

JAMES W. DEATON

PETITIONER

V.

U.S. DEPARTMENT OF AGRICULTURE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

James W. Deaton
Box 721
Starkville, Mississippi 39759
(601) 323-2304
Pro Se

QUESTIONS

1. An agency employee testified under oath that it is an acceptable risk to intentionally produce and intentionally release a known human pathogen upon an unsuspecting human population. Does a federal agency have the right to intentionally produce and intentionally release a known human pathogen upon an unsuspecting human population? If so, what is the legal way that a test human population is chosen and the legal way of selecting the person responsible for the production and release of the known human pathogen upon an unsuspecting human population?
2. Is it legal for a federal agency to charge an employee (federal manager) with insubordination and punish the employee because he will not force agency employees to work in a known human pathogen infested area without agency safety officer assistance?
3. Is it legal for a federal agency to charge an employee (federal manager) with insubordination and punish the employee because he will not intentionally produce and intentionally release upon an unsuspecting human population a known human pathogen?
4. When no one in a federal agency will intentionally produce and intentionally release a known human pathogen upon an unsuspecting human population, is it legal for the federal agency to take the taxpayer dollars and hire someone outside the federal agency to intentionally produce and intentionally release a known human

pathogen upon an unsuspecting human population?

5. Is it legal for a federal agency to ignore a request for an environmental impact statement prior to the agency releasing a known human pathogen upon an unsuspecting human population?
6. Is it legal for a federal agency to intentionally make an employee party to the transfer of taxpayer dollars where a human pathogen is intentionally released upon an unsuspecting human population over the employees objection?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW 1

TABLE OF AUTHORITIES.....3

OPINIONS BELOW.....3

JURISDICTION 3

STATEMENT OF THE ISSUE 4

STATEMENT OF REASONS WHY WRIT OF CERTIORARI BE GRANTED.....4

STATEMENT OF THE CASE 5

CONCLUSION 12

TABLE OF AUTHORITIES

Whistleblower Protection Act. The Petitioner respectfully prays for a writ of certiorari to review the judgement of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is given in the Appendix on pages 1 thru 4. The opinion of the Administrative Judge for the Merit Systems Protection Board is given in the Appendix on pages 5 thru 14.

JURISDICTION

The judgement of the court of Appeals, Appendix page 15, was entered on September 25, 1992, The Petition for Rehearing was denied on October 20, 1992, Appendix page 16. The jurisdiction of this court

was supplied me by an information sheet from the U.S. court of Appeals for the Federal Circuit. I am the petitioner pro se.

STATEMENT OF THE ISSUE

The written record does not support the conclusions drawn by the United States Court of Appeals For The Federal Circuit.

STATEMENT OF REASONS WHY WRIT OF CERTIORARI BE GRANTED

I respectfully request that I be awarded my rights concerning the Whistleblower Protection Act because in 1989 I do not believe it was legal for a federal agency to intentionally produce and intentionally release upon an unsuspecting human population a human pathogen that is hospital waste and has been known to kill people since 1888. I do not believe that it is legal for a federal agency to ignore an agency engineer's request for safety officer assistance and that an environmental impact study be made concerning the release of a known human pathogen into the environment when the agency engineer is ordered by the agency to evaluate the project. I do not believe it is legal for an agency to punish a federal manager because he will not intentionally produce and intentionally release into the environment and onto an unsuspecting human population a known human pathogen and force agency employees to work in the known human pathogen infested area

without safety officer assistance. When no federal manager will intentionally produce and intentionally release a known human pathogen and a known biological warfare agent upon an unsuspecting human population I do not believe it is legal for a federal agency to use taxpayer dollars to hire someone outside the federal system to intentionally produce and intentionally release a known human pathogen upon an unsuspecting human population. I do not believe it is legal through deception for a federal agency to make an employee party to the transfer of federal tax dollars that are used illegally.

STATEMENT OF THE CASE

The record shows that as stated in the January 8, 1991 memo from M. E. Carter and the April 9, 1991 memo from R. D. Plowman I was charged with insubordination (R. R. Oltjen sworn statement) and removed as Research Leader because I would not intentionally produce and intentionally release upon an unsuspecting human population namely the students of Mississippi State University and the residents of Oktibbeha County Mississippi the human pathogen Salmonella enteritidis.

The record shows that Salmonella enteritidis is a paratyphoid which can produce an illness characteristic of typhoid fever and has been used as biological warfare agents. The record shows the agency wanted me to produce as much as 200 pounds of the human pathogen

daily and demanded that the human pathogen be released into the environment. The record also shows the human pathogen the agency releases into the environment is medical waste the comes from a dead or sick man, woman, or child and has been known to kill people and make people sick since 1888. The record clearly shows that the idea of releasing the human pathogen into the environment was introduced during the April, 1989 visit by A. B. Thiermann and Charles Beard. I promptly told Thiermann I was not planning to release the human pathogen on the residents of Starkville, Mississippi. And the record clearly shows that Thiermann testified under oath that he did not plan to contain the human pathogen to the work area and that Thiermann stated under oath that he did not have the expertise to make the determination of containing the human pathogen to the work area. Thiermann also testified that he is no engineer. The record shows that an agency engineer (Mr. Allen) was assigned to the project by P. A. Putnam and that the agency engineer recommended safety considerations for the workers and that an Environmental Impact Study be made for this project. The recommendations by the agency engineer were ignored and I believe this man lost his job also after his office was first moved to a greenhouse. The record then shows that following the agency engineers report, I was told by Putnam to build a facade and act like I am containing the human pathogen to the work area when I knew I was not. I would not do that so I was ordered to be in Knipling's office bright

and early the next morning where I was greeted with the statement "I don't want to know the facts". The record shows I carried the facts to Knipling. The timing when the agency wanted me to produce and release the human pathogen on an unsuspecting human population was interesting also, because I had just returned to work from a spleenectomy following a leukemia diagnosis and the agency knew that I desperately needed the health insurance.

From a safety standpoint, the record shows that I asked for safety assistance, Mr. Allen asked P. A. Putnam for safety assistance and Mississippi State University asked that the protocol for the human pathogen project be passed through their Biosafety Committee. As the record states, the agency responded by not allowing the agency safety officers to become involved and searched this country until they found someone who was not concerned with the health and welfare of the employees and the general public (Oltjen sworn statement). Even though the agency had open flock facilities outside the pathogen contained compounds in Athens, Georgia where Charles Beard is located, as well as College Station, Texas, Georgetown, Delaware and finally Beltsville, Maryland where R. R. Oltjen and E. B. Knipling are located, the record shows the agency did not try to force anyone within the agency other than me to produce and release the human pathogen upon an unsuspecting human population.

The record also shows that both Beard and Thiermann were

members of a 1988 Salmonella enteritidis Agency Task Force who wrote the agency report which showed that in the 1970's and 1980's that employees were at risk from Salmonella enteritidis while working with turkeys infected with Salmonella enteritidis and the invasive pathogenic properties of Salmonella enteritidis for humans were discussed in 1988. This 1988 Salmonella enteritidis Agency Task Force also showed that Salmonella enteritidis in an ambient environment of 21-24 degrees centigrade will survive 730 days in a dusty feed environment and 750 days (maximum observation period) in meat. Both Thiermann and Beard were members of this agency task force and the report published in 1988-before the agency wanted me to produce and release the human pathogen on an unsuspecting human population and force agency employees to work in the human pathogen infested area in 1989. Beard also supervised the agency employee who wrote the chapter of the 1965, 1972 and 1978 editions of the textbook which shows that the survivability of the human pathogen once placed in the environment has a long life span and is dangerous for the employees and their families. The record shows that the human pathogen as stipulated in these textbooks can survive in flies for four weeks, can be transmitted by flies as much as three miles, and can survive for several weeks on vegetables kept at room temperature. The record shows there are a supermarket, student apartments, restaurants and sororities just across the street from where the agency demanded I produce 200

pounds daily of the human pathogen and release the human pathogen into the environment. The record shows that Knipling acknowledged the fact that he was aware of the literature concerning employee safety and human health implications from my May, 1989 meeting with him.

The record also shows that Beard stated during his April, 1989 visit that he did not know the implications of forcing employees to work in a human pathogen infested area. Beard only had 40 chickens infected with Salmonella enteritidis and the agency wanted me to infect 3000 chickens then force employees to work in the human pathogen infested area and with no safety officer assistance. The record shows that as with any pathogenic organism, the human pathogen must first be introduced into an area before sickness and death can occur.

In 1989, the agency was well aware that federal managers can be criminally prosecuted for violating environmental laws. The federal managers that were prosecuted killed fish. The organism the agency wanted me to release into the environment kiils people. The record shows that in March, 1988 the agency stated that we must abide by the National Institutes of Health, 1985 regulations which states that air locks, negative air pressure and air filters are secondary barriers designed to protect against the accidental release outside the facility. In 1989 the agency would not let me follow these regulations.

The record shows that in June, 1989 the salmonella enteritidis project was cancelled at the agency lab where I worked. However, in

July, 1989 the project was assigned to me and as late as October 30, 1989 the project was still assigned to me. The record also shows that the agency sent the paperwork to the agency Administrative Office at Mississippi State for the Pennsylvania project with instructions to not let me know this, obviously with intent to deceive.

In a taped recording by the Administrative Judge, R. R. Oltjen discusses a project concerned with Salmonella enteritidis that was being conducted in Maryland. The record shows that a Maryland Assistant Secretary notes that 500 people became sick and 11 people died during that time frame when the agency was releasing or condoning the release of the human pathogen in Maryland. This Maryland Assistant Secretary as the record shows, reported that the human pathogen was recovered from dust samplings. Mr. Michael B. Robinson, a 20 year veteran animal caretaker, testified that dust from within the chicken house is deposited outside the chicken house. The record shows that I made certain in May, 1989, that E. B. Knipling was aware that the dust from within the chicken house could spread throughout the area. Knipling stated, "We originally assigned the research to Mississippi on the basis that such rigorous health and safety precautions would not be required". In 1989, in addition to people other than the poultry industry and Mississippi State University Officials asking the agency not to release the human pathogen into the environment, the record shows that the City of Starkville, Mississippi sanitation engineers did not want the

pathogen released into the environment.

The record shows that in 1989, P. A. Putnam and/or E. B. Knipling discussed the situation with both Mississippi State University Officials and the poultry industry and neither wanted the human pathogen released into the environment. The record then shows that the agency found someone outside the federal system to intentionally produce and intentionally release the human pathogen into the environment.

The record also shows that Charles Beard neither testified nor submitted a sworn statement for the record, therefore how could an Administrative Judge rely entirely on employee safety implications with a known human pathogen and a known biological warfare agent, which is clearly stated in the record when the man did not even testify? The record also clearly shows by Thiermanns own testimony before the Administrative Judge, that Thiermann knew in April, 1989, that he was going to work for the group of people in the agency that obtains taxpayer dollars to clean up the human pathogen once someone releases the human pathogen into the environment. The record shows that R. D. Plowman, E. B. Knipling or F. A. Putnam stated their intentions such as, quotes, "tracking Salmonella through large flocks and into the environment", "we had only allocated enough money to do it in an existing chicken house", "what I heard was the reason Dr. Deaton envisioned such expensive structural changes was that he wanted to

contain the pathogen", "discussions were regarding funds available, cost and need for HEPA filters in building 28. I told him it would take too long to implement, would be too costly, and that is not what headquarters and APHIS wanted", "what was wanted without unnecessary health, safety and political concerns was a simulated flock test on transmission of Salmonella enteritidis (SE)", and "renovation of facilities to meet the immediate research needs would be costly; furthermore, the high degree of containment that would be incorporated in the renovated facilities would compromise the objectives of the planned flock simulation study". If these people manage other biological warfare agents, animal and plant diseases and insects in the same manner as with this project, then it is easy to see how the sweetpotato whitefly went from Florida to California and a continual problem seems to exist with the Mediterranean fruit fly.

CONCLUSION

The record speaks for itself and the responsible individuals within the agency knew precisely what they were doing in 1988 and 1989. I did nothing wrong and I did not deserve the turmoil that was forced into my life and my family's life because I would not intentionally produce and intentionally release upon an unsuspecting human population a human pathogen and force agency employees to work in the human pathogen infested area without safety officer assistance. The fact also remains that people are becoming sick with

some dieing and business failures are occuring in Pennsylvania resulting from Salmonella enteritidis infection, with taxpayer dollars used in the clean-up, which I do not believe that is the situation in Mississippi. The record also shows that about 61 million of taxpayer dollars were used by the agency in the Pennsylvania area about nine years ago to clean-up avian influenza, a disease that kills only chickens, not people.

I respectfully request my rights be awarded me in this matter. Using federal tax dollars and placing people at risk or causing human sickness and death by intentionally having a human pathogen and known biological warfare agent released into the environment and upon an unsuspecting human population by individuals within a federal agency with the intent to obtain more taxpayer dollars is surely illegal. The human pathogen released upon the people is medical waste and is obtained from a hospital. Accordingly, this Petition for Certiorari should be granted.

Dated: December 7, , 1992.

James W. Deaton

James W. Deaton
Petitioner Pro Se

(2)

92-1010

Supreme Court, U.S.
FILED
DEC 14 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

No. _____

JAMES W. DEATON

PETITIONER

V.

U.S. DEPARTMENT OF AGRICULTURE

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

James W. Deaton
Box 721
Starkville, Mississippi 39759
(601) 323-2304
Pro Se

1 A 1

APPENDIX TABLE OF CONTENTS

Appendix Page

Opinion of Court of Appeals for the Federal Circuit 2

Opinion of Administrative Judge, MSPB 6

Judgement of Court of Appeals..... 16

Order Denying Petition for Rehearing 17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 92-3283

James W. Deaton

Petitioner

v.

Department of Agriculture
Respondent.

Decided: September 25, 1992

Before Michel, Plager, and Rader, Circuit Judges. Per Curiam.

Decision

James W. Deaton (Deaton) petitions for judicial review of the October 8, 1991 decision of the Administrative Judge (AJ), Docket No. AT122191W0726, which upon denial of review on January 28, 1992 became the final decision of the Merit Systems Protection Board (MSPB or Board). 5 C.F.R. section 1201.113(b). At issue was Deaton's reassignment with no reduction of grade or pay from the position of Research Leader to that of Research Animal Scientist. This reassignment was appealed to the MSPB under the Individual Right of Action (IRA) provision of the Whistle Protection Act (WPA), 5 U.S.C. section 1221. The Board held that no corrective action was warranted. We affirm.

DISCUSSION

This case arises out of a difference of scientific opinion between Deaton and his supervisors. In January 1989, Deaton's laboratory facility was selected to perform research on the pathogenicity and transmission of ***Salmonella enteritidis*** in commercial chicken flocks. ***S. enteritidis*** is a known human pathogen which can contaminate eggs and other foodstuffs. While it thrives and reproduces inside the human body, it does not fare well when exposed to the ambient environment.

Specifically, Deaton was instructed to perform a study with an "open flock" simulating commercial settings. Deaton felt that the proposed infection with and study of ***S. enteritidis*** in an open flock would inevitably contaminate the surrounding environment and place the nearby residents and commercial enterprises at risk. In response to Deaton's expressed reservations, Drs. Thiermann and Beard of the Department of Agriculture (DOA) visited the facility and discussed the proposed research with Deaton. Thiermann generated a memo dated April 17, 1989, in which he detailed facility modifications and other recommendations which were, in his view, sufficient to conduct the open flock research in safety. Deaton apparently disagreed; he continued to believe that the open flock research would result in contamination of the environment, and he continued to vigorously object to the project. In June of 1989, DOA decided to reassign the open flock project to another research facility.

Deaton later documented his conflict with management in letters to the Office of Inspector General (OIG) date September 5, 1989 and October 11, 1989. On December 3, 1989, Deaton was reassigned to the non-managerial position of Research Animal Scientist. Deaton, believing that the reassignment was a direct consequence of his opposition to the open flock project and to his "whistleblowing" communications with the OIG, sought the aid of the Office of Special Counsel (OSC) in regaining his managerial position. After OSC declined to pursue Deaton's grievance, Deaton appealed the reassignment under the IRA provision of the WPA.

The WPA provides the IRA for employees whose personnel actions were taken in reprisal for disclosures of certain information. The disclosure must pertain to what the employee ***reasonably*** believes is a violation of law, rule or regulation, gross mismanagement, or "substantial and specific danger to public health or safety." 5 U.S.C. § 2302 (b) (8). The reasonableness of that belief must of course be measured at the time of the disclosure, not at time of subsequent appeals. It is a factual determination, and as such we must uphold the MSPB unless we find its determination to be unsupported by substantial evidence. 5 U.S.C. § 7703.

Here we find that substantial evidence supports the MSPB's conclusion that Deaton's view of the dangers posed by the open flock experiment were not reasonable under the circumstances. Among other

evidence, there was evidence concerning the nature of the risk from *S. enteritidis*, and the susceptibility of that pathogen to heat, light, and dryness. The record reflected communication between Drs. Thiermann and Beard (both of whom were found by the AJ to be credible and knowledgeable on the matter), and Deaton, and a memorandum from Dr. Thiermann to Deaton detailing the steps to be taken by Deaton's facility to contain any potential public health risk.

The MSPB found that there was more than sufficient evidence that the experiment did not pose a threat to health and safety, and therefore Deaton's beliefs were not reasonable. The MSPB concluded that there was no basis for Deaton's argument that his disclosures evidenced gross mismanagement or violations of law, rule, or regulation. Since there is substantial evidence in the record to support the MSPB's conclusion, we affirm the decision of the MSPB that corrective action was not warranted in this case.

No costs.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

JAMES W. DEATON, Appellant, V. DEPARTMENT OF AGRICULTURE, Agency.	DOCKET NUMBER AT122191W0726 DATE: October 8, 1991

James W. Deaton, Starkville, Mississippi, pro se.

Sarah Tuck, Esquire, Beltsville, Maryland, for the agency.

BEFORE

Howard J. Ansorge
Administrative Judge

INITIAL DECISION

INTRODUCTION

James W. Deaton, Ph.D., was a Research Leader, GM-15, in the Poultry Research Unit at the South Central Research Laboratory of the Agricultural Research Service of the Department of Agriculture at Mississippi State University in Starkville, Mississippi. On December 3, 1989, the appellant lost his Research Leader position when he was reassigned to the position of Research Animal Scientist, GM-15, without a reduction in grade or pay. On June 6, 1991, Dr. Deaton

appealed to the Board alleging that he was reassigned in retaliation for his whistleblowing activities. Because Dr. Deaton first sought relief from the Special Counsel, the Board has jurisdiction over this appeal. See 5 C.F.R. § 1209.2(b) (1) (1991). A hearing was held in Aberdeen, Mississippi on August 22, 1991.

For the reasons set forth below, I find that no corrective action is warranted in this appeal.

ANALYSIS AND FINDING

Background

The appellant's alleged whistleblowing activity arose out of his involvement in a scientific research project aimed at studying the human pathogen *Salmonella enteritidis* (SE) in poultry. Robert Oltjen, the Associate Deputy Administrator of the Agricultural Research Service (ARS), testified that the poultry industry and Congress had become concerned about the spread of the SE pathogen because of reports that people had contracted SE poisoning after consuming chicken eggs. According to Dr. Oltjen, the outbreak of SE poisoning had reached epidemic proportions in Britain by 1988. Dr. Oltjen testified that in fiscal year 1989 Congress allocated funds for food safety, specifically targeting the SE pathogen. The ARS program staff, which had the authority to allocate the funds, decided to study the SE pathogen in an open-flock setting because that is the environment that the poultry industry uses to house chickens. After inspecting several facilities, the

ARS program staff decided to conduct open-flock research in the flock house at the appellant's laboratory at Mississippi State University. Consequently, in January 1989, the appellant was directed to design a research project to determine the pathogenicity and transmission of the SE pathogen in a simulated flock environment and to develop new methods to diagnose and control the spread of SE. (Agency File at tab 4a). The ARS allocated approximately $650,000 for the project.

The appellant contends that he was asked to conduct the project in a manner that posed a danger to public health and safety. The appellant argues that the agency wanted him to infect 3,000 chickens in his laboratory's flock house and, thereby, produce 200 pounds of the SE pathogen per day. The appellant contends that the SE pathogen could not be contained inside the flock house because the pathogen could be carried by dust, insects, birds, rodents, and water. The appellant stated that dust and insects could transport the pathogen to the surrounding college dormitories as well as to the supermarket across the street from the appellant's laboratory. The appellant proposed renovating the laboratory's facilities to create a biocontained, air-conditioned flock room with high efficiency air and sewer filters as well as incinerators, back-up power generators, and security fencing. The estimated cost of the renovations proposed by the appellant was $1.9 million.

The appellant's superiors did not believe that the facilities at the

appellant's laboratory required the extensive bio-containment precautions that he proposed. The appellant's superiors believed that the spread of the SE pathogen could be safely controlled with fewer and far less expensive renovations to the flock house. (See April 17, 1989 letter to the appellant from Dr. Alexandro Thiermann describing the renovations necessary to conduct the SE research project, Agency File at tab 4e). Because they were unable to resolve this dispute, the SE research project was reassigned to a research facility in Pennsylvania in June 1989.

Whistleblowing

By letters dated September 5 and October 11, 1989, the appellant informed the agency's inspector general that the appellant's superiors were forcing him to grow the SE pathogen and release it into the environment. (Agency File at tabs 4j & 4o). Three months later, on December 3, 1989, the appellant was relieved of his responsibilities as Research Leader and reassigned to the position of Research Animal Scientist. The appellant contends that he was reassigned in retaliation for disclosing to the inspector general that his superiors were forcing him to release the SE pathogen into the environment on an unsuspecting public. The agency contends that the appellant's disclosure to the inspector general was not protected under § 2302(b)(8) because the proposed SE research project did not pose a substantial danger to public health or safety.

Burden of Proof

To prevail in this appeal, the appellant must establish by a preponderance of the evidence that a "disclosure" under 5 U.S.C. § 2302(b) (8) contributed to the agency's decision to reassign him. A protected "disclosure" under § 2302(b) (8) is defined as any disclosure of information by an employee that the employee "reasonably believes" evidences (a) a violation of any law, rule, or regulation or (b) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

Analysis

The critical issue in this appeal is whether the open-flock research proposed by the appellant's superiors posed a danger to public health and safety. To support its contention that the proposed project was safe, the agency presented the testimony of Alexandro Thiermann, the agency's former National Program Leader for Animal Health. Dr. Thiermann is a doctor of Veterinary Medicine with a Ph.D. in immunology and microbiology. Dr. Thiermann testified that the SE pathogen is commonly found in eggs and is transmitted to humans by ingestion. Dr. Thiermann explained that the SE pathogen can only survive inside a moist, contained environment and is extremely sensitive to drying, sunlight, and temperature. Consequently, the SE pathogen dies within minutes after being exposed and cannot long survive while being transported on the surface of objects. Dr. Thiermann testified that the pathogen is transmitted to humans who have eaten poorly cooked

eggs and infects the gastrointestinal tract.

Dr. Oltjen confirmed that the SE pathogen is distinct from other types of salmonella because it forms inside eggs and is almost exclusively confined to eggs. In Dr. Oltjen's opinion, the SE pathogen can only be transmitted to humans who ingest eggs. The opinions of Drs. Oltjen and Thiermann are consistent with the February 17, 1989 task force report describing the agency's comprehensive program for dealing with the SE pathogen. (See Exhibit 8 of Volume 5 of the Report of Investigation of discrimination complaint, Record at tab 8).

Dr. Thiermann testified that the SE pathogen could be properly controlled at the appellant's laboratory and was not a danger to public health. Dr. Thiermann explained that the SE pathogen colonizes strictly inside the intestines after ingestion and that the SE pathogen is not transported by airborne dust or transmitted by exposure through breaks in the skin. Consequently, Dr. Thiermann testified, the air flow to and from the flock house did not require tight control in order to contain the spread of the SE organism. In addition, with the exception of using traps to contain feathers, untreated waste water could flow from the flock house without risk of spreading the organism because sewage treatment is sufficient to control the spread of the pathogen. Dr. Thiermann further testified that infected insects or rodents can only transmit the Se pathogen to humans if the insects or rodents deposit the pathogen on the outside of something that a person ingests before the

pathogen dies or if a person ingests the infected insect or rodent itself.

Dr. Thiermann further testified that Dr. Charles Beard is the most widely recognized poultry pathology expert in the nation.[1] According to Dr. Thiermann, Dr. Beard is the most renowned expert in diseases of poultry, the organisms that affect poultry, and the agents that cause infections in poultry. Both Drs. Oltjen and ARS Area Director Paul Putnam confirmed that Dr. Beard is an authority on SE. Dr. Thiermann further testified, without contradiction, that the appellant is familiar with Dr. Beard's expertise in poultry pathology because the appellant has known Dr. Beard for years and attended many conferences with him. In addition, Dr. Thiermann testified that both he and Dr. Beard toured the appellant's laboratory with the appellant in April 1989 and told the appellant at the conclusion of their inspection that the SE research project could be safely conducted with the modifications that they suggested. (See Dr. Thiermann's April 17, 1989 letter, Agency file at tab 4e)

Dr. Thiermann's testimony was corroborated by three other witnesses: ARS Deputy Administrator Edward Knipling, Ph.D.; ARS Area Director Paul Putnam, Ph.D.; and Associate Deputy Administrator Oltjen. All three witnesses testified that the experts employed by ARS believed that the proposed SE pathogen research project did not pose a danger to public health because there was little if any risk of human

---

[1]The record shows that Beard has published over 120 scientific articles on diseases and infectious organisms in poultry.

infection.

Conclusion

The appellant presented no scientific evidence challenging the expertise of Dr. Thiermann or the credibility of his testimony. Consequently, the scientific evidence of record show that the SE pathogen is transmitted by ingesting poorly cooked eggs. The evidence also show that the possibility of transmitting the SE pathogen to humans through dust, water, insects, birds, or rodents is highly remote. The evidence further shows that the principal recognized authority in poultry pathology concluded that the proposed research did not pose a danger to public health and safety.

The undisputed evidence also shows that the appellant knew that Dr. Beard was the foremost nationally recognized authority in poultry pathology. The evidence further shows that Dr. Beard, as well as Dr. Thiermann, specifically told the appellant that it was safe to conduct open-flock research of the SE pathogen in the flock house located in the appellant's laboratory. Therefore, because the appellant admitted that he did not know the safety precautions required for conducting SE research, the appellant would have to reject Dr. Beard's assurances that the proposed testing method was safe. Given the appellant's knowledge of Dr. Beard's expertise in poultry pathology, I find that it was unreasonable for the appellant to so discount Dr. Beard's opinion. Therefore, I conclude that it was unreasonable for the appellant to

believe that the project posed a danger to public health and safety. Consequently, I find that the appellant could not have reasonably believed that his letters to the agency's inspector general disclosed a danger to public health and safety. As a result, I conclude that the appellant's letters to the inspector general were not protected disclosures within the meaning of the Whistleblower Protection Act.

The appellant also claimed that the agency's decision to proceed with open-flock SE research was gross mismanagement because of the danger that the SE pathogen could be released into the environment. Because the evidence shows that the SE research project posed no danger to public health and safety and that the appellant knew or should have known that the project was safe, I find that the appellant could not reasonably believe that his letters to the inspector general disclosed gross mismanagement. Therefore, I find that the appellant's letters were not protected disclosures of gross mismanagement under the Whistleblower Protection Act.

The Appellant further claimed that he would have violated various laws, rules, and regulations had he proceeded with the research project in his laboratory. The appellant cited a plethora of statutory and regulatory provisions that, he contends, would have been violated. The validity of the appellant's arguments in this regard are essentially dependent upon a finding that the SE research project posed a danger to the public health and safety. Because the evidence show that the SE

research project posed no danger to public health and safety and that the appellant knew or should have known that the project was safe, I find that the appellant could not have reasonably believed that his letters to the inspector general disclosed violations of any laws, rules, or regulations. Therefore, I find that the appellant's letters were not protected disclosures of statutory or regulatory violations under the Whistleblower Protection Act.

Finally, the appellant claimed that he disclosed an abuse of authority by notifying the inspector general that Area director Putnam told two scientists at an open meeting on July 21, 1989 that they would not be working at the laboratory after October 1989. Neither scientist testified at the hearing in this appeal and the appellant submitted no evidence that the two scientists in fact lost their jobs. Moreover, Area Director Putnam explained that the laboratory did not have the funds to support 2 of the 5 scientist positions because the laboratory lost $175,000 when funds were transferred to the research facility in Pennsylvania along with the SE research project in June 1989. Under the circumstances, I find the the appellant could not have reasonably believed that his letters to the inspector general disclosed an abuse of discretion. Therefore, I find that the appellant's letters were not protected disclosures under the Whistleblower Protection Act.

DECISION

No corrective action is warranted in this appeal.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

92-3283

James W. Deaton, Petitioner

v.

Department of Agriculture, Respondent.

JUDGEMENT

On appeal from the Merit Systems Protection Board in Case No. AT122191W0726. This cause having been heard and is considered, it is ordered and adjudged: Affirmed.

Entered By the Order of The Court

Dated Sep. 25, 1992 Frances X. Gindhart, Clerk

Issued as a mandate: October 27, 1992

ORDER

Before Michel, Circuit Judge, Plager, Circuit Judge, and Rader, Circuit Judge.

A petition for rehearing having been filed by the petitioner, upon consideration thereof, it is ordered that the petition for rehearing be, and the same hereby is denied.

The mandate will issue on October 20, 1992.

Dated: October 20, 1992 For The Court,

Filed: October 20, 1992 Francis X. Gindhart, Clerk by Diane M. Grye

cc. James W. Deaton and Robert E. Kirschman

Deaton V Agriculture, 92-3283 (MSPB - AT 122191W0726).